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In The

Supreme Court of the United States

October Term, 1949

No. 412, Misc.

BENNIE DANIELS and LLOYD RAY DANIELS,

Petitioners,

vs.

THE STATE OF NORTH CAROLINA,

Respondent.

Brief of the State of North Carolina, Respondent, Opposing Petition For Writ of Certiorari.

STATEMENT OF THE CASE

The Petitioners, Bennie Daniels and Lloyd Ray Daniels, seek, by writ of *certiorari*, to have certain decisions of the Supreme Court of North Carolina reviewed by the Supreme Court of the United States. The Petitioners were indicted by a Grand Jury of Pitt County, North Carolina, in an indictment charging them with murder in the first degree for the killing of William Benjamin O'Neal. The indictment was returned by the Grand Jury at the March Term, 1949, of the Superior Court. The indictment will be found at page 168, Tr. Vol. 1. The Petitioners were duly arraigned, entered a plea of not guilty, and two members of the Bar of Pitt County were appointed to represent the Petitioners. (Tr. Vol. 4, p. 2) The Petitioners were examined at the State Hospital as to their sanity (Tr. Vol. 4, p. 3); but in

the meantime, Petitioners had secured their own counsel. The case was called for trial at the March 30th Term, 1949, of the Superior Court of Pitt County, and upon the calling of the case, the Petitioners moved to quash the indictment and entered a challenge to the array of petit jurors because of the exclusion of Negroes from the Grand and Petit Juries of Pitt County because of race or color. A hearing was held on these motions, both the State and Petitioners introducing evidence, and the Trial Judge made findings of fact and overruled the motion to quash and the challenge to the array. (Tr. Vol. 1, pp. 2-167) The Court's findings of fact and order will be found in Tr. Vol. 4, pp. 4-22. The jury found the Petitioners guilty of murder in the first degree, without recommendation of mercy, and sentence of death was imposed in accordance with the laws of North Carolina. Counsel for the Petitioners, in apt time, caused notice of appeal to be entered (Tr. Vol. 4, p. 681), and in accordance with North Carolina law (G. S. 1-282), the Petitioners were allowed sixty days from the date of judgment in which to serve their statement of case on appeal, and the State was allowed forty-five days thereafter to serve exceptions or countercase. Counsel for Petitioners attempted to serve a statement of case on appeal upon the Solicitor of Pitt County on August 6th, 1949, by merely leaving the statement of case on appeal in the office of the prosecuting attorney with his secretary. This was one day late or one day after the expiration of the sixty days allowed by the Court. The Solicitor or prosecuting officer of the district filed certain exceptions to the Petitioners' statement of case on appeal and at the same time entered a motion to strike out the Petitioners' statement of case on appeal for failure to serve the same within the time fixed by law and by the Court. This was heard by the Trial Judge on the 29th day of September, 1949, and the State's motion to strike out the case on appeal was allowed, the order being entered on the 1st day of October, 1949.

The Petitioners filed two petitions for *certiorari* in the

Supreme Court of North Carolina, one on September 27th, 1949, and the other on October 10th, 1949. The Supreme Court of North Carolina reviewed the whole situation, and on November 2nd, 1949, entered an opinion which will be found reported as STATE v. BENNIE DANIELS and LLOYD RAY DANIELS, 231 N. C. 17, 56 S.E. (2d) 2. The opinion of the Supreme Court of North Carolina quotes the allegations of the petitions and the affidavit filed by one of the attorneys for Petitioners and, for the reasons stated in the opinion, denied the petitions but suggested in the opinion that the Petitioners could apply to the Court for a writ of error *coram nobis*.

Thereafter, on the 9th day of November, 1949, the Petitioners filed a petition in the Supreme Court of North Carolina requesting that a writ of error *coram nobis* be issued to the Superior Court of Pitt County. This petition was answered by the State, and on December 14th, 1949, the Supreme Court of North Carolina handed down an opinion, stating in substance that the petition was insufficient to justify the Court in issuing the writ, and, therefore, the petition was denied. This opinion will be found reported as STATE v. BENNIE DANIELS and LLOYD RAY DANIELS, 231 N. C. 341, 56 S.E. (2d) 646.

Thereafter, the Attorney General filed a motion in the Supreme Court of North Carolina to dismiss the appeal, which motion was allowed by the Supreme Court of North Carolina on the 1st day of March, 1950. The Court's opinion on the motion is reported as STATE v. BENNIE DANIELS and LLOYD RAY DANIELS, 231 N. C. 509, 57 S.E. (2d) 653.

FACTS

The Petitioners, Bennie Daniels and Lloyd Ray Daniels, two young colored men residing in Pitt County, were seen in the Town of Greenville on the 5th of February, 1949. Bennie Daniels was armed with a knife and engaged in an altercation with the witness, James Henry Riddick. (Tr.

Vol. 1, p. 169) The witness Riddick also stated that, in his opinion, the knife exhibited in the courtroom was the same knife as the one he had observed in the hand of Bennie Daniels. (Tr. Vol. 1, p. 170) After this incident, the Petitioners, according to the witness, Charlie Moore, engaged in fighting in the street between nine and ten o'clock with some other colored boys, and Bennie Daniels was again observed with a knife. There was some blood on the clothing of the Petitioners. (Tr. Vol. 1, p. 176) At a later hour, the Petitioners tried to engage the services of a taxicab from the witness, Leslie Manning, who refused to carry the Petitioners in his cab. (Tr. Vol. 1, p. 180) The Petitioners were seen by another taxicab driver, Norman Tripp, somewhere between nine and ten o'clock that night to get into the taxicab of William Benjamin O'Neal. O'Neal's taxicab was parked close to the cab of the witness. O'Neal was over talking to somebody when the Petitioners got into his cab. This witness observed O'Neal get into his cab, where the Petitioners were already seated and drive off in the direction of Grimesland. (Tr. Vol. 1, p. 182) The witness Tripp identified the Petitioners from pictures shown to him by the Sheriff.

The body of William Benjamin O'Neal was found Sunday morning, February 6th, 1949, at a place some miles from the Town of Greenville, near some tobacco barns located just off of a country road, by the witness, Leroy Smith. (Tr. Vol. 2, p. 341) Smith reported the incident to the witness Baker, who called the Sheriff of the County. (Tr. Vol. 2, p. 349) The place showed signs of a struggle, the door of the taxicab was open, and beside the door was an overcoat. The driving license of O'Neal was found two or three feet from the cab. The glove compartment of the cab was open, and an empty billfold was found. The taxicab permit of O'Neal was also found, with his picture attached, and also some papers with a Social Security number. O'Neal's head was crushed, his throat had been cut, and, in fact, his whole body was cut, crushed and beaten all

over. Around his body were found some fifty tobacco sticks, some of which had been broken and had blood on them; and there were two bricks found near the body that had blood on them. The account of Sheriff Tyson as to what he found at the scene of the crime will be found in Tr. Vol 1, p. 193. The account of Chief of Police L. D. Page will be found in Tr. Vol. 2, p. 306. The account of S. G. Gibbs as to the condition of O'Neal's body and the scene of the crime will be found in Tr. Vol. 2, p. 357. The account of Captain S. B. Dorsey, witness for the State, as to what he found at the scene of the crime will be found in Tr. Vol. 2, p. 430. Other peace officers and witnesses also testified and were in substantial agreement as to what was found, although some witnesses observed things that other witnesses did not. Both new and used rubber contraceptives were found at the scene of the crime, indicating that the spot had been used as a place of assignation, but there is no evidence in the record of the race of the people who used this isolated spot for such purposes.

The overcoat found at the scene of the crime was identified as a coat belonging to William Benjamin O'Neal, the identification being made by his mother (Tr. Vol. 2, p. 325) and also by the witness, J. W. Phillips, who sold the overcoat to O'Neal. (Tr. Vol. 2, p. 356) A woman's glove had been found at the scene of the crime near the taxicab, and it was shown by the witness Faulkner that he had driven this taxicab before O'Neal had ever driven the cab and that this glove was in the taxicab when the witness Faulkner started driving the same. (Tr. Vol. 2, p. 353) It was also shown by the witness, J. W. Phillips, that he owned the taxicab that O'Neal was last seen driving and that this lady's glove was in the compartment of the taxicab and had been there for two months. (Tr. Vol. 2, p. 355) From the testimony of these witnesses, it appears that the glove had been in the taxicab for some time before O'Neal became the driver.

Upon information received by the officers and not disclosed in the record, Lloyd Ray Daniels was arrested on

the following Monday morning between one and one-thirty o'clock in a tenant house on the L. O. Whitehurst farm. The house was occupied by a man by the name of Wilkes. He was found lying on a bed or cot, fully dressed, with his shoes on and all his clothes except his hat. Some cold blood was found on the back of his left ear, and there were scratches around and under his neck and some small cuts on his hands. (Tr. Vol. 1, pp. 199-200) There were several officers present at his arrest, but Lloyd Ray Daniels was placed in an automobile and taken to Williamston, over in Martin County, which is a county that adjoins Pitt County. In this automobile with Lloyd Ray Daniels were Sheriff Tyson, Deputy Sheriff Manning, and S. G. Gibbs, a highway patrolman, who is now a member of the State Bureau of Investigation. See also Gibbs' testimony in Tr. 2, p. 357. On the way to Williamston, according to the testimony of the officers, Lloyd Ray Daniels made a statement (Tr. Vol. 2, p. 261) in which he admitted that he participated in killing O'Neal and gave some details of the murder. He was carried to Williamston and placed in the Martin County Jail.

The Petitioner, Bennie Daniels, was arrested between five and six o'clock on Tuesday morning about a mile and a half east of the Town of Winterville on the Bryan Tripp farm. He was arrested by the Sheriff of the County, Patrolman Gibbs, and Ray Smith, a fireman. (Tr. Vol. 1, pp. 215, 219) The Petitioner, Bennie Daniels, was placed in an automobile and carried also to Williamston, where he was placed in jail. On the way, according to the testimony of the officers, Bennie Daniels admitted that he had participated in the killing of O'Neal. (Tr. Vol. 2, pp. 355-356) Later, on Tuesday night, on the 8th day of February, 1949, according to the evidence of the peace officers, the Petitioners were both questioned in the jail at Williamston, and written confessions were made, which were signed by Bennie Daniels and were also signed by Lloyd Ray Daniels by his mark. These written confessions appear in Tr. Vol. 1, pp.

273 & 276. When Bennie Daniels was arrested on the Bryan Tripp farm, he was standing behind the door, fully dressed. (Tr. Vol. 1, p. 270) These various confessions on the part of the Petitioners were used by the State in evidence. See Tr. Vol. 1, 273-276, Exhibit 8, 276-278, Exhibit 9, 363-364, Exhibit 32. Further evidence on the confessions will be found in Tr. Vol. 1, pp. 284, 389, 391, pp. 216, 219, 258, 259, 271, 366, 383-384. From the above references to the Transcript of Evidence, it will also be seen that the Petitioners denied killing O'Neal and contended that whatever statements they made were induced by fear and coercion and that they did not, in fact, admit killing O'Neal. Evidence as to the voluntariness of the confessions was introduced by both the State and the Petitioners which is according to the practice in North Carolina in passing on confessions, and the Court found that the confessions were made freely and voluntarily. (Tr. Vol. 1, p. 268)

ARGUMENT

I

PETITIONERS WERE NOT DEPRIVED OF ANY CONSTITUTIONAL RIGHTS BY THE USE OF THEIR CONFESSIONS AS EVIDENCE AGAINST THEM.

There is a conflict of evidence as to whether or not the confessions obtained from the Petitioners were freely and voluntarily given or whether they were obtained by force, coercion and fear. The peace officers who arrested each of the Petitioners testified that they warned both Petitioners that any statements they made would be used against them, that they did not strike or harm either of the Petitioners in any manner and that nothing was done to coerce or to cause either of the Petitioners to be actuated by the motive of fear. The Petitioners testified to the contrary, but the Petitioner, Lloyd Ray Daniels, does not claim that any officer ever struck him at any time. The Petitioner, Bennie

Daniels, testified that some officer slapped him one time, but he was never able to identify this officer. Lloyd Ray Daniels was arrested between 1:00 and 1:30 A.M. on February 7th. He was handcuffed, and after walking some short distance to the car, he was placed therein and taken to Williamston. Bennie Daniels was arrested early Tuesday morning, February 8th, and was handcuffed and placed in an automobile and carried to the Williamston Jail.

It will be noticed that according to Lloyd Ray Daniels' own evidence on cross-examination, he admits the arrest and that he was fully dressed with the exception of his hat and coat. (Tr. Vol. 3, pp. 484, 485) He admits that Patrolman Gibbs had on his overcoat, but he contends that Gibbs had his hand on his pistol. He admits that he was shown some papers when his confession was typed at the Williamston Jail. (Tr. Vol. 3, p. 489) He also admits that Patrolman Gibbs did some writing in a notebook with the use of his flashlight. (Tr. Vol. 3, p. 490) The peace officers contended that when Bennie Daniels and Lloyd Ray Daniels were both questioned in jail at Williamston, the whole time of questioning, typing out the confessions and signing same consumed, at the most, only an hour or an hour and a half. This is not denied by either one of the Petitioners. In Tr. Vol. 3, p. 546, it will be found that Bennie Daniels admits that the officers told him that what had been written down would be used against him. The amount of time used in questioning either of the Petitioners, and as testified to by the peace officers, is likewise not denied by Bennie Daniels. See Tr. Vol. 1, p. 265 for Bennie Daniels' estimate as to the amount of time consumed in making the statement, transcribing and writing the same. See also Tr. Vol. 1, pp. 251, 256 and Tr. Vol. 2, pp. 322 and 403 as to the amount of time consumed in questioning the Petitioners. It will also be found, by reference to Tr. Vol. 1, p. 218, that the Sheriff told the father of Bennie Daniels that he had arrested him.

We think it is clear that under the provisions of the

North Carolina statutes, the officers had a right to arrest Petitioners without warrants. Section 15-41 of the General Statutes of North Carolina is as follows:

> "§ 15-41. *When officer may arrest without warrant.*—Every sheriff, coroner, constable, officer of police, or other officer, entrusted with the care and preservation of the public peace, who shall know or have reasonable ground to believe that any felony has been committed, or that any dangerous wound has been given, and shall have reasonable ground to believe that any particular person is guilty, and shall apprehend that such person may escape, if not immediately arrested, shall arrest him without warrant, and may summon all bystanders to aid in such arrest."

Section 15-42 of the General Statutes of North Carolina is as follows:

> "§ 15-42. *Sheriffs and deputies granted power to arrest felons anywhere in state.*—When a felony is committed in any county in this State, and upon the commission of the felony, the person or persons charged therewith flees or flee the county, the sheriff of the county in which the crime was committed, and/or his bonded deputy or deputies, either with or without process, is hereby given authority to pursue the person or persons so charged, whether in sight or not, and apprehend and arrest him or them anywhere in the State.

It is also true that Section 15-46 of the General Statutes of North Carolina is as follows:

> "§ 15-46. *Procedure on arrest without warrant.*—Every person arrested without warrant shall be either immediately taken before some magistrate having jurisdiction to issue a warrant in the case, or else committed to the county prison, and, as soon as may be, taken before such magistrate, who, on proper proof, shall issue a warrant and thereon proceed to act as may be required by law."

There is also, as referred to by the Petitioners, another statute dealing with the rights of arrested persons, and this

statute is Section 15-47 of the General Statutes of North Carolina, and is as follows:

> "§ 15-47. *Arresting officer to inform offender of charge, allow bail except in capital cases, and permit communication with counsel or friends.*—Upon the arrest, detention, or deprivation of the liberties of any person by an officer in this state, with or without warrant, it shall be the duty of the officer making the arrest to immediately inform the person arrested of the charge against him, and it shall further be the duty of the officer making said arrest, except in capital cases, to have bail fixed in a reasonable sum, and the person so arrested shall be permitted to give bail bond; and it shall be the duty of the officer making the arrest to permit the person so arrested to communicate with counsel and friends immediately, and the right of such persons to communicate with counsel and friends shall not be denied.
>
> "Any officer who shall violate the provisions of this section shall be guilty of a misdemeanor and shall be fined or imprisoned, or both, in the discretion of the court."

It is not disputed in the record in this case that the peace officers who arrested the Petitioners did not inform any attorney of their arrest, but it is also undisputed, so far as the record is concerned, that the Petitioners never, at any time, asked to see any attorney or never, at any time, asked to see any of the members of their family. Under these circumstances, the statute has not been violated, and it is also clear to us that the detention of Petitioners was not illegal since they were arrested for a capital offense. Section 15-47 of the General Statutes of North Carolina has been construed by the Supreme Court of North Carolina in the case of STATE v. EXUM, 213 N. C. 16, 195 S.E. 7. In this case, the facts disclosed that the defendant was imprisoned in jail in another county. The defendant was asked to make a confession and did so upon the condition that he be taken to his home to confer with relatives. While on the trip in the car with the officers, the defendant con-

fessed the crime. The defendant at the trial contended that the above statute had been violated and that he had been illegally detained. In disposing of this contention, the Court said:

> "The evidence at the trial shows that immediately after his arrest, the defendant was informed by the sheriff that he was charged with the murder of James Williams. This is a capital case. For this reason the provisions of the statute with respect to bail are not applicable to this case.
>
> "There is no evidence in the record tending to show that after his arrest and while he was in the custody of the sheriff the defendant demanded of the sheriff that he be permitted to communicate with friends or with counsel. For this reason the provisions of the statute with respect to the right of a defendant in the custody of an officer and charged with the commission of a crime, to communicate with friends and counsel are not applicable to this case.
>
> "Conceding, however, that the sheriff had violated the provisions of the statute, in the instant case, it would not follow that a voluntary confession made by the defendant to the sheriff would be inadmissible as evidence because of such violation. It is not so provided in the statute."

The evidence in the record shows, at least on the part of the peace officers, that the Petitioners were informed of the charges against them. In view of the state of this record, we do not think it can be said, under the laws of North Carolina, that the Petitioners were illegally detained, and it is not believed that Section 15-46 of the General Statutes of North Carolina applies in every case of a capital offense.

The mere detention and questioning of a suspect is not prohibited either at common law or under the due process clause.

LYONS v. OKLAHOMA, 322 U.S. 596, 88 L. ed. 1481
LISENBA v. CALIFORNIA, 314 U.S. 219, 239-241, 86 L. ed. 166, 181, 182

Even if it should be considered that the detention of the Petitioners was illegal, this does not necessarily become decisive on the question of the voluntariness of Petitioners' confessions; and if it should be decided that Petitioners were detained contrary to law, this does not, of itself, decide the issue in Petitioners' favor.

LISENBA v. CALIFORNIA, 314 U.S. 219, 86 L. ed. 166, 179

All of the cases cited and relied upon by Petitioners either show long continued questioning in relays by officers, brutal treatment, threats or combinations of these factors, plus illegal detention. We briefly survey these cases.

HAILEY v. OHIO, 332 U. S. 596, 92 L. ed. 224: The petitioner, a boy of fifteen years old, was questioned for five hours by police in relays by one or two each. He was shown an alleged confession of his co-defendants. A lawyer tried to see him twice but was refused admission by police. His mother testified that his clothes were torn and bloodstained.

MALINSKI v. NEW YORK, 324 U. S. 401, 89 L. ed. 1029: Malinski was not allowed to see his attorney although he asked for him. Malinski was held in a hotel from 8:00 o'clock A.M. to 6:00 o'clock P.M., then held in a hotel for that night and for the next three days. He was questioned at various times and made various confessions. There is no comparison in the facts in the MALINSKI case and in the present case.

ASHCRAFT v. TENNESSEE, 322 U. S. 143, 88 L. ed. 1192: The petitioner was subjected to a thirty-six-hour period of practically continuous questioning, seated under powerful electric lights. This questioning was done by relays of officers and experienced investigators. There is no comparison in this case to the facts now before the Court.

LYONS v. OKLAHOMA, 322 U. S. 596, 88 L. ed. 1481: Here the petitioner had made a confession which was admittedly involuntary and illegal. He afterwards made

another confession, which it was contended was voluntary. The primary question considered in the opinion was the effect of the first confession on the second confession.

McNABB v. U. S., 318 U. S. 332, 87 L. ed. 819: The petitioner in this case was questioned by numerous officers over a period of two days. This case came from a lower Federal Court, and no constitutional issue was decided. The case is not an authority in evaluating the constitutionality of confessions used in State Courts.

WARD v. TEXAS, 316 U. S. 547, 86 L. ed. 1663: Here the petitioner was arrested without a warrant by a sheriff from another county; he was removed to a county more than one hundred miles away and for three days was driven about from county to county and questioned continuously by various officers who told him of threats of mob violence, and there was little probability of such event. The sheriff testified that he saw evidence of cigarette burns on the petitioner's body.

LISENBA v. CALIFORNIA, 314 U. S. 219, 86 L. ed. 166: The petitioner in this case was held incommunicado for a long period of time, was refused counsel and questioned from Sunday night until Tuesday morning. The petitioner made two confessions, one of which was not admitted, but the second one was ruled to be valid.

WHITE v. TEXAS, 310 U. S. 530, 84 L. ed. 1342: Here the petitioner, an illiterate farm hand, was held in jail for several days without counsel and out of touch with friends. For several nights, he was taken, handcuffed, by armed officers into the woods for interrogation. In jail, the petitioner was placed by himself, where the sheriff kept watching the petitioner and talking to him. A confession was obtained after questioning by the county attorney from 11:00 P.M. to 3:30 A.M. the next morning. During this period, the officers who had taken him to the woods were in and out of the room.

CHAMBERS v. FLORIDA, 309 U. S. 227, 84 L. ed. 716:

Here a group of young Negroes were arrested and held in jail without formal charges. They were not permitted to see counsel or friends, and believing that they were in danger of mob violence, made confessions at the end of an all-night session, following five days of questioning, each by himself, by State officers and other white citizens and in the presence of from four to ten white men, and after a previous confession had been pronounced "unfit" by the prosecuting attorney.

BROWN v. MISSISSIPPI, 297 U. S. 278, 80 L. ed. 682: In this case, there was undenied brutality, such as whipping the petitioner, hanging and then taking him down, and his body showed marks of other brutal treatment.

WAN v. U. S., 266 U. S. 1, 69 L. ed. 131: In this case, the petitioner was subjected to continuous examination for seven days by police officers, and which examination on one occasion continued throughout the night. The petitioner was sick and in pain, and the medical examiner testified that the petitioner would have confessed in order to secure relief. This was a Federal case.

WATTS v. INDIANA, 338 U. S. 49, 69 S. Ct. 1347: The petitioner Watts had been held for six days, during which time, except for Sunday, he was questioned by relays of officers from 5:30 or 6:00 P.M. until 2:00 or 3:00 A.M. He was not taken before a magistrate, as required by Indiana law, and was not advised of his constitutional rights.

TURNER v. PENNA., 338 U. S. 62, 69 S. Ct. 1352: Turner was questioned by relays of officers from four to six hours a day for five days. He was not permitted to see friends or relatives and was not informed of his right to remain silent.

HARRIS v. SOUTH CAROLINA, 338 U. S. 68, 69 S. Ct. 1354: Harris was held in jail for several days, during which time he was questioned, and on one night, five officers worked in relays. On the next night, the questioning continued under the same conditions from 1:30 in the afternoon until past one the following morning; and on Wednes-

day afternoon, the Chief of the State Constabulary, with a half-dozen of his men, questioned Harris for an hour, and the local officers then questioned Harris for three and one-half hours longer. The sheriff then threatened to arrest petitioner's mother for having stolen property, and petitioner confessed.

The Petitioner quotes from the next to the last paragraph in the opinion in WARD v. TEXAS, 316 U. S. 547, 86 L. ed. 1663, in which the Court lays down a series of factors or tests and states that any one of the grounds would be sufficient cause for reversal. The Court will see from an examination of the cases cited in the note to support this proposition that there were always combinations of brutality or persistent questioning plus, in some cases, illegal detention or threats of mob violence. The point is that in each of the cases cited to uphold the paragraph, the facts reveal combinations of these situations, and the cases are not decided on any one single point. The cases of CANTY v. ALABAMA, 309 U. S. 629, 84 L. ed. 988; LOMAX v. TEXAS, 313 U. S. 544, 85 L. ed. 1511; and VERNON v. ALABAMA, 313 U. S. 547, 85 L. ed. 513, were disposed of by *per curiam* opinions, and no recitals of the facts are given.

We say, therefore, that where the findings of the State Court are supported by substantial evidence, the same should be upheld, and, in fact, as determined by the cases of LISENBA v. CALIFORNIA, *supra,* and LYONS v. OKLAHOMA, *supra,* the same are final unless unconstitutionality is shown by admitted facts.

II

PETITIONERS HAVE NOT SHOWN INTENTIONAL, ARBITRARY AND SYSTEMATIC EXCLUSION OF ELIGIBLE PERSONS OF THEIR RACE FROM JURY SERVICE.

The Petitioners filed a motion to quash the bill of indictment and entered a challenge to the array of petit jurors

upon the grounds that persons of Petitioners' race had been arbitrarily and systematically excluded from jury service, both as to the Grand Jury and the Petit Jury. (Tr. Vol. 1, p. 167) The evidence on these motions appears in Tr. Vol. 1, pp. 2-167. After hearing the evidence for both the Petitioners and the State on these motions, the trial Court made findings of fact and entered an order overruling said motions. These findings of fact appear in Tr. Vol. 4, pp. 1-22.

The Petitioners were duly arraigned and entered a plea of not guilty at the March Term, 1949, of the Superior Court of Pitt County. Two attorneys were appointed by the Court to defend the Petitioners; and upon motion of Petitioners, the case was continued until the next term of Court, which was the April Term, 1949. At the April Term, 1949, it appeared that the mental examination of Petitioners had not been completed. (Tr. Vol. 4, pp. 2, 3) At this same April Term of Court, the Petitioners had employed other counsel to represent them, and the attorneys theretofore appointed by the Court were discharged, and the case was continued until the May 30th Term, 1949. (Tr. Vol. 4, p. 3) At the May 30th Term, 1949, when the case was called for trial, the Petitioners, for the first time, presented a motion to quash the indictment and challenge to the array of petit jurors upon the grounds of race discrimination.

Under the North Carolina practice, a motion to quash should be entered before the persons indicted plead to the bill of indictment. If such a motion is made after plea and arraignment, then the allowance of the motion is in the discretion of the Court.

STATE v. BURNETTE, 142 N.C. 577, 55 S.E. 72
STATE v. BEAL, 199 N.C. 278, 294, 154 S.E. 604, 613
STATE v BREWER, 180 N.C. 716, 717, 104 S.E. 655, 656

While the Court passed upon these motions by considering the merits as shown by the evidence, the Court nevertheless relied also upon the local rule of practice that such

a motion could not be insisted on as a matter of right because the same had not been made in apt time and that its allowance was a matter of discretion. In other words, the ruling is placed upon both grounds. See Tr. Vol. 1, 167.

The statutes governing the selection of jurors, both for Grand Jury and Petit Jury service, appear in the appendix, and it appears from the Transcript that the Petitioners did not contend in their motions that these jury statutes were, within themselves, unconstitutional but that Petitioners contended that the statutes had been administered in such a manner as to result in an unconstitutional racial discrimination. (Tr. Vol. 4, p. 4)

The population of Pitt County appears to be 61,244 persons, of which 32,151 belong to the white race, and 29,086 belong to the Negro race. The evidence justifies the estimate, as found by the Court, that 17,323 persons of the white race were over twenty-one years of age, that 13,762 of the Negro race were over twenty-one years of age.

In the year of 1946, the total persons on the tax list were 15,517. Of these, 10,344 were white persons, and 5,173 were colored. This list is the list that would be used for the year of 1947. The total listed for taxes in 1945 was 14,368, and of this, 9,466 were of the white race, and 4,902 of the colored race. For the year of 1947, there was a total of 16,455, of which 10,894 belonged to the white race, and 5,561 belonged to the colored race. For the year of 1948, there was a total of 16,926, of which 11,193 belonged to the white race, and 5,733 belonged to the colored race. The Court will find the tabulation for the various years as to the tax list in Tr. Vol. 4, pp. 141, 142.

It was admitted by both the Petitioners and the State that the jury boxes for the County contained the names of approximately 10,000 persons of both the white and Negro race. It was further found as a fact by the Court (Tr. Vol. 4, p. 5) that prior to the year of 1947, no Negro had served on the Grand Jury in the Superior Court of Pitt County in more than twenty years but that prior to 1947, members

of the Negro race were occasionally called and served on the jury.

In 1947, the jury boxes of Pitt County were purged, and all names of jurors appearing on the scrolls were destroyed. A new list of names was prepared, both from the tax list and from other sources, and the evidence shows that there was nothing appearing on these lists to indicate whether a person was of the white or Negro race, although there was much evidence taken as to certain red marks appearing on some scrolls. The examination of the members of the Board of County Commissioners who are charged with constituting the jury box begins on Tr. Vol. 1, p. 112, and the Court will see that the red marks were explained and that they have no reference to race, dealing largely with changes of residence, deaths, etc.

When the June meeting was held of the Board of County Commissioners for the purpose of purging the jury box, the County Attorney met with the Board of Commissioners and advised the Board that both under decisions of the State Supreme Court and of the Supreme Court of the United States, eligible Negroes could not be excluded from the jury list, (Tr. Vol. 1, pp. 122, 123) and that the list of names was composed of the tax list and from names of persons registered to vote in the various townships. The Commissioners also made investigations, each one in his own township.

The members of the Board of Commissioners, the Clerk to the Board of Commissioners, and all persons having anything to do with the jury list testified fully as to how the jury list was made up and how the jurors were selected. The Court will find this in Tr. Vol. 1, p. 112, et seq.

A public-local act is applicable to Pitt County whereby the membership of the Grand Jury is staggered so that nine members are chosen after the first days of January and July of each year to serve for a term of one year. This public-local act appears in Tr. Vol. 4, p. 15. It will thus be seen that although the Grand Jury which indicted the

Petitioners did not contain any colored persons, nine names were drawn according to the statute and from a box that contained the names of both white and colored. All names were drawn from the whole panel of jurors by a child under ten years of age as required by the statute. (Tr. Vol. 4, p. 16) It was furthermore found by the Court as a fact, and the evidence supports the finding, that members of the Negro race have been drawn for jury duty at practically every term of the Superior Court since the box was purged in July, 1947. (Tr. Vol. 4, p. 17) A venire of 150 jurors was ordered by the Court for the trial of this case for the purpose of supplementing the panel of regular jurors. Of these names drawn, five members were of the Negro race, and out of the total number of persons actually summoned by the Sheriff, two were Negroes, and of these two, one served upon the jury which tried these Petitioners. (Tr. Vol. 4, p. 17)

In Tr. Vol. 1, pp. 72, 73, there will be found a list containing the number of jurors summoned for jury duty from August, 1945, on through the May Term, 1947. The Clerk to the Board of Commissioners also appended an affidavit (Tr. Vol. 1, p. 73) showing the number of Negroes who were drawn for jury duty at each term. It should be carefully noted that there might have been more Negroes drawn at all of these terms, but from his knowledge, not less than the number set forth was drawn.

Both the Petitioners and the State offered as witnesses several persons from each race who testified that they had never served on any jury in Pitt County although they were apparently eligible. It will be seen that a great many of these persons were ministers or undertakers, and by reason of their occupation were automatically excused from jury duty by the statute. A copy of the statute appears in the appendix. The testimony as to the white persons who have never served on a jury in the county begins in Tr. Vol. 1, p. 74, et seq.

It is not denied that under the Fourteenth Amendment,

the eligible citizens of Petitioners' race are entitled to their chance to serve on the various juries and cannot be deprived of this chance by design. But fairness in selection does not require a guaranteed, proportional representation of the Petitioners' race on every jury selected and constituted.

AKINS v. TEXAS, 325 U.S. 398, 89 L. ed. 1692
THOMAS v. TEXAS, 212 U.S. 278, 53 L. ed. 512
VIRGINIA v. RIVES, 100 U.S. 313, 25 L. ed. 667
SWAIN v. STATE, 215 Ind. 259, 18 N.E. (2d) 921, 926
ZIMMERMAN v. STATE,.....Md....., 59 A. (2d) 675
CERTIORARI DENIED, 93 L. ed. (Ad. Op. No. 7) 425
16 C. J. S. (Constitutional Law), Sec. 540

The type of discrimination condemned is said to be "purposeful discrimination" (AKINS v. TEXAS, 325 U. S. 398, 89 L. ed. 1692), or a "long-continued, unvarying, and wholesale exclusion of Negroes from jury service" (NORRIS v. ALABAMA, 294 U. S. 587, 79 L. ed. 1074). There is a presumption that officers in charge of jury selection have performed their duty fairly and justly (TARRANCE v. FLORIDA, 188 U. S. 519, 47 L. ed. 572, 116 So. 470 (Fla.), Certiorari denied in 278 U. S. 599, 73 L. ed. 525) and without discrimination against race or class. The burden of proof is upon Petitioners to show an alleged discrimination in the selection of a grand or petit jury (AKINS v. TEXAS, 325 U. S. 398, 89 L. ed. 1692; MURRAY v. LOUISIANA, 163 U. S. 101, 41 L. ed. 87).

In AKINS v. TEXAS, 325 U. S. 398, 89 L. ed. 1692, the Court uses the words "purposeful discrimination." In NORRIS v. ALABAMA, 294 U. S. 587, 79 L. ed. 1074, the Court uses the words "long-continued, unvarying, and wholesale exclusion of Negroes from jury service."

It is very generally held that the burden of proof is on the defendant or defendants to show an alleged discrimination in the selection of a grand or petit jury.

AKINS v. TEXAS, 325 U.S. 398, 89 L. ed. 1692
MURRAY v. LOUISIANA, 163 U.S. 101, 41 L. ed. 87

There is a presumption that officers in charge of the selection and summoning of a jury or jury panel will be presumed to have performed their duty fairly and justly without discrimination against any race or class. In other words, discrimination in the selection of a jury will not be presumed.

TARRANCE v. FLORIDA, 188 U.S. 519, 47 L. ed. 572, 116 So. 470 (Fla.). (Certiorari denied in 278 U.S. 599, 73 L. ed. 525.)

Fairness in selection has never been held to require proportional representation of races upon a jury.

AKINS v. TEXAS, 325 U.S. 398, 89 L. ed. 1692
VIRGINIA v. RIVES, 100 U.S. 313, 25 L. ed. 667
THOMAS v. TEXAS, 212 U.S. 278, 53 L. ed. 512

A defendant has no constitutional right to be indicted or tried by any particular jury or by a jury composed in part of members of his race or class.

STATE v. PEOPLES, 131 N.C. 784, 42 S.E. 814
STATE v. SLOAN, 97 N.C. 499
STATE v. LOGAN, 341 Mo. 1164, 111 S.W. (2d) 110; (1937)
MARTIN v. TEXAS, 200 U.S. 316, 50 L. ed. 494

"It is unsafe, we think, to attach too much significance to abstract, mathematical ratios or to the so-called law of recurrences in determining whether there has been arbitrary discrimination in the selection of the juries."

SWAIN v. STATE, 215 Ind. 259, 18 N.E. (2d) 921, 926

The fact that in this case there were found separate lists with the word "colored" at the top of the page containing the list does not show discrimination.

Respondent contends, therefore, that the Petitioners have

not met the burden imposed upon them and as required by the principles stated in the case of FAY v. NEW YORK, 91 L. ed. 1517 (No. 17, Advance Opinions) where this Court said:

> "It is fundamental in questioning the composition of a jury that a mere showing that a class was not represented in a particular jury is not enough; there must be a clear showing that its absence was caused by discrimination, and in nearly all cases it has been shown to have persisted over many years. Virginia v. Rives, 100 US 313, 322, 323, 25 L ed 667, 670, 671; Martin v. Texas, 200 US 316, 320, 321, 50 L ed 497, 498, 499, 26 S Ct 338; Thomas v. Texas, 212 US 278, 282, 53 L ed 512, 513, 29 S Ct 393; Smith v. Texas, 311 US 128, 85 L ed 84, 61 S Ct 164; Hill v. Texas, 316 US 400, 86 L ed 1559, 62 S Ct 1159; Akins v. Texas, 325 US 398, 89 L ed 1692, 65 S Ct 1276, supra. Also, when discrimination of an unconstitutional kind is alleged, the burden of proving it purposeful and intentional is on the defendant. Tarrance v. Florida, 188 US 519, 47 L ed 572, 23 S Ct 402; Martin v. Texas, 200 US 316, 50 L ed 497, 26 S Ct 338; Norris v. Alabama, 294 US 587, 79 L ed 1074, 55 S Ct 579; Snowden v. Hughes, 321 US 1, 8, 9, 88 L ed 497, 502, 503, 64 S Ct 397; Akins v. Texas, 325 US 398, 400, 89 L ed 1692, 1694, 65 S Ct 1276."

Under the North Carolina practice, the questions raised by the Petitioners' motion to quash are in the first instance heard and decided by the trial Court. The trial Court makes findings of fact; and in the absence of an abuse of discretion or in the absence of lack of evidence to support findings, such decision of the trial Court is ordinarily binding upon the Supreme Court. This practice is illustrated by the following cases:

STATE v. HENDERSON, 216 N.C. 99, 3 S.E. (2d) 357
STATE v. BELL, 212 N.C. 20, 192 S.E. 852
STATE v. WALLS, 211 N.C. 487, 191 S.E. 232
STATE v. COOPER, 205 N.C. 657, 172 S.E. 199
STATE v. LORD, 225 N.C. 354, 34 S.E. (2d) 205

While it is recognized by Respondent that on a question of this kind, this Court will examine the facts and evidence to see if fundamental constitutional rights have been denied, nevertheless, great weight is accorded to the decisions of State Courts who make the initial decisions and have a better opportunity to investigate the facts.

THOMAS v. TEXAS, 212 U.S. 278, 53 L. ed. 512
AKINS v. TEXAS, 325 U.S. 398, 89 L. ed. 1692

In THOMAS v. TEXAS, *supra,* this Court said:

"As before remarked, whether such discrimination was practiced in this case was a question of fact, and the determination of that question adversely to plaintiff in error by the trial court and by the court of criminal appeals was decisive, so far as this court is concerned, unless it could be held that these decisions constitute such abuse as amounted to an infraction of the Federal Constitution, which cannot be presumed, and which there is no reason to hold on the record before us. On the contrary, the careful opinion of the court of criminal appeals, setting forth the evidence, justifies the conclusion of that court that the Negro race was not intentionally or otherwise discriminated against in the selection of the grand and petit jurors. Indeed, there was a Negro juror on the grand jury which indicted plaintiff in error, and there were Negroes on the venire from which the jury which tried the case was drawn, although it happened that none of them were drawn out of the jury box."

In AKINS v. TEXAS, *supra,* this Court said:

"As will presently appear, the transcript of the evidence presents certain inconsistencies and conflicts of testimony in regard to limiting the number of Negroes on the grand jury. Therefore, the trier of fact who heard the witness in full and observed their demeanor on the stand has a better opportunity than a reviewing court to reach a correct conclusion as to the existence of that type of discrimination. While our duty, in reviewing a conviction upon a complaint that the procedure through which it was obtained violates due process and equal protection under the Fourteenth

> Amendment, calls for our examination of evidence to determine for ourselves whether a Federal constitutional right has been denied, expressly or in substance and effect, Norris v. Alabama, 294 U. S. 587, 589, 590, 79 L. ed. 1074, 1076, 1077, 55 S. Ct. 579; Smith v. Texas, 311 U. S. 123, 130, 85 L. ed. 84, 86, 61 S. Ct. 164, we accord in that examination great respect to the conclusion of the state judiciary, Pierre v. Louisiana, 306 U. S. 354, 358, 83 L. ed. 757, 760, 59 S. Ct. 536. That respect leads us to accept the conclusion of the trier on disputed issues 'unless it is so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process.' "

Respondent contends, therefore, that the Board of Commissioners of Pitt County upon the advice of the County Attorney purged the jury box in 1947 and Negroes have been serving on trial juries since that time, one Negro serving on the jury that heard this case. The fact that no Negroes appeared on the Grand Jury is not strange in view of the system of drawing nine Grand Jurors at a time under the system prevailing in Pitt County.

III

THE PROCEDURAL METHOD OF NORTH CAROLINA TO DETERMINE WHETHER CONFESSIONS WERE MADE FREELY AND VOLUNTARILY IS NOT IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The Petitioners contend that the method used in the State of North Carolina to determine whether or not confessions are freely and voluntarily made is in violation of the due process clause of the Fourteenth Amendment.

Under the practice prevailing in this State, the whole question of admissibility, including the question of whether the confession was voluntary, is for the Trial Judge, and it is error to leave any part of these functions to the jury.

STATE v. WHITENER, 191 N.C. 659, 132 S.E. 603
STATE v. ROGERS, 216 N.C. 731, 6 S.E. (2d) 499
STATE v. DICK, 60 N.C. 440

What facts would render a confession involuntary, the type of evidence admissible to establish such facts, and whether there is any evidence to support a finding against admissibility, are questions of law on which the ruling of the Trial Judge may be reviewed.

STATE v. CROWSON, 98 N.C. 595, 4 S.E. 143

The weight of the evidence and the credibility of the witnesses offered to prove or disprove such facts are matters of fact as to which the finding of the Trial Judge is conclusive and will not be reviewed.

STATE v. GRASS, 223 N.C. 31, 25 S.E. (2d) 193
STATE v. GOSNELL, 208 N.C. 401, 181 S.E. 323

Under the decisions of the Supreme Court of North Carolina, if the Trial Judge admits the confession in evidence, its weight is for the jury, and they may believe it or not and judge of its sufficiency to prove the fact confessed as they see fit.

STATE v. HARDEE, 83 N.C. 619
STATE v. HENDERSON, 180 N.C. 735, 105 S.E. 339
STATE v. OVERTON, 75 N. C. 200

The various States follow different methods in determining the voluntariness of confessions. About twelve States, including North Carolina, use the principle and the practice that such a question is solely for the Court. The largest group of States leave the question ultimately for the jury, and in some States, the method is doubtful. The situation as to the different States will be found in a note appended to the case of STATE v. CRANK, 170 A.L.R. 542, Anno. p. 567 (105 Utah 332, 142 P. (2d) 178). See also STATE v. COMPO, 85 A.L.R. 866, Anno. p. 870 (108 N.J.L. 499, 158 A. 541).

The States are free to adopt various methods of determining the voluntariness of confessions, and such methods may vary as to their essential features provided they offer opportunity for notice and hearing and other fundamentals of fairness. When these are provided, no question arises under the due process clause or the equal protection of the law clause of the Fourteenth Amendment.

LISENBA v. CALIFORNIA, 314 U.S. 219, 86 L. ed. 166
WARD v. TEXAS, 316 U.S. 547, 86 L. ed. 1663
LYONS v. OKLAHOMA, 322 U.S. 596, 88 L. ed. 1481

If the Court should decide that there was an error in the charge of the Court to the jury on the question of the confession, then this would not deprive the Petitioners of any constitutional rights under the Fourteenth Amendment.

DAVIS v. TEXAS, 139 U.S. 651, 35 L. ed. 300

Errors of a state court in interpreting and applying the laws of that state furnish no basis for the claim that there has been a denial of the due process of law guaranteed by the Fourteenth Amendment to the Federal Constitution.

HOWARD v. KENTUCKY, 200 U.S. 164, 50 L. ed. 421

The Constitution of the United States does not guarantee that the decisions of State Courts shall be free from error or require that their pronouncements shall be consistent.

WORCESTER COUNTY TRUST CO. v. RILEY, 302 U.S. 292, 82 L. ed. 268

Where the proceedings in the State Court were conducted under the ordinary forms of criminal prosecutions, there was no denial of due process of law.

MILLER v. TEXAS, 153 U.S. 535, 38 L. ed. 812

The due process clause of the Fourteenth Amendment does not operate to enforce upon the states a uniform code

of criminal procedure: and it is for them to choose the methods and practices by which crime is brought to book, so long as they observe those ultimate dignities of man which the United States Constitution assures.

CARTER v. ILLINOIS, 329 U.S. 173, 91 L. ed. 172

The cases cited below establish the proposition that the States have a right to establish their own criminal codes and practices and that the Fourteenth Amendment is not designed to furnish a Federal review of every type and kind of decision made by a State in its own Courts in regard to its own practice and construction of the law.

BUCHALTER v. NEW YORK, 319 U.S. 427, 87 L. ed. 1492
HOWARD v. FLEMING, 191 U.S. 126, 48 L. ed. 121
TWINING v. NEW JERSEY, 211 U.S. 78, 53 L. ed. 97
SNYDER v. MASSACHUSETTS, 291 U.S. 97, 78 L. ed. 674
CHAPLINSKY v. NEW HAMPSHIRE, 315 U.S. 568, 574, 86 L. ed. 1031, 1036
MOORE v. MISSOURI, 159 U.S. 673, 40 L. ed. 301

IV

THE PETITIONERS IN THIS CASE HAVE NOT EXHAUSTED THEIR RIGHTS IN THE STATE COURTS.

The Petitioners lost their right of appeal to the Supreme Court of North Carolina because their attorneys, through their own laches and negligence, served their statement of case on appeal one day late. The Petitioners then applied for *certiorari* to the Supreme Court of North Carolina, and this was denied.

STATE v. DANIELS, 231 N.C. 17, 56 S.E. (2d) 2

It was suggested in the opinion in this case that the Petitioners still had the right to apply to the Supreme Court

of North Carolina for a writ of error *coram nobis*. The remedy of writ of error *coram nobis* is available in the State of North Carolina to review constitutional questions. See IN RE TAYLOR, 230 N. C. 566, 53 S.E. (2d) 857, where an application for such a writ was granted for a review of constitutional questions. The Petitioners in this case filed an application for a writ of error *coram nobis* before the Supreme Court of North Carolina, and the Supreme Court denied this application because of the insufficiency of the petition. See STATE v. DANIELS, 231 N. C. 341, 56 S.E. (2d) 646. Since the Supreme Court of North Carolina merely held that the petition was insufficient, there is no reason why the Petitioners cannot now avail themselves of this remedy if they will file a proper and sufficient petition before the Supreme Court of North Carolina. The Respondent, therefore, contends that the Petitioners have never exhausted their remedies afforded by the Supreme Court of North Carolina for a review of this question. The Supreme Court of North Carolina has, therefore, not passed upon the constitutional issues now raised by the Petitioners.

CONCLUSION

The Respondent, State of North Carolina, therefore, contends that the Petitioners have not brought themselves within the rulings of this Court which allow their case to be considered upon application for *certiorari* because of the alleged constitutional questions asserted by them.

Respectfully submitted,

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Counsel for the State of
North Carolina, Respondent.

APPENDIX

Chapter 9, General Statutes of North Carolina—Jury

§ 9-1. The board of county commissioners for the several counties, at their regular meetings on the first Monday in June in the year 1947, or the jury commissions or such other legally constituted body as may in the respective counties be charged by law with the duty of drawing names of persons for jury service, at the times of their regular meetings, and every two years thereafter, shall cause their clerks to lay before them the tax returns for the preceding year for their county, and a list of names of persons who do not appear upon the tax lists, who are residents of the county and over twenty-one years of age, from which lists the board of county commissioners or such persons who reside in the county who are of good moral character and have sufficient intelligence to serve as members of grand and petit juries. A list of the names thus selected by the board of county commissioners or such jury commissions shall be made out by the clerk of the board of county commissioners or such jury commissions and shall constitute the jury list of the county and shall be preserved as such.

The clerk of the board of county commissioners or such jury commissions, in making out the list of names to be laid before the board of county commissioners or such jury commissions, may secure said lists from such sources of information as deemed reliable which will provide the names of persons of the county above twenty-one years of age residing within the county qualified for jury duty. There shall be excluded from said lists all those persons who have been convicted of any crime involving moral turpitude or who have been adjudged to be non compos mentis.

§ 9-2. *Names on list put in box.*—The commissioners at their regular meeting on the first Monday in July in the year nineteen hundred and five, and every two years there-

after, shall cause the names on their jury list to be copied on small scrolls of paper of equal size and put into a box procured for that purpose, which must have two divisions marked No. 1 and No. 2, respectively, and two locks, the key of one to be kept by the sheriff of the county, the other by the chairman of the board of commissioners, and the box by the clerk of the board.

§ 9-3. *Manner of drawing panel for term from box.*—At least twenty days before each regular or special term of the superior court, the board of commissioners of the county shall cause to be drawn from the jury box out of the partition marked No. 1, by a child not more than ten years of age, thirty-six scrolls except when the term of court is for the trial of civil cases exclusively, when they need not draw more than twenty-four scrolls. The persons whose names are inscribed on said scrolls shall serve as jurors at the term of the superior court to be held for the county ensuing such drawing, and for which they are drawn. The scrolls so drawn to make the jury shall be put into the partition marked No. 2. The said commissioners shall at the same time and in the same manner draw the names of eighteen persons who shall be summoned to appear and serve during the second week, and a like number for each succeeding week of the term of said court, unless the judge thereof shall sooner discharge all jurors from further service. The said commissioners may, at the same time and in the same manner, draw the names of eighteen other persons, who shall serve as petit jurors for the week for which they are drawn and summoned. The trial jury which has served during each week shall be discharged by the judge at the close of said week, unless the said jury shall be then actually engaged in the trial of a case, and then they shall not be discharged until the trial is determined.

§ 9-6. *Jurors having suits pending.*—If any of the jurors drawn have a suit pending and at issue in the superior court, the scrolls with their names must be returned into partition No. 1 of the jury box.

§ 9-7. *Disqualified persons drawn.*—If any of the persons drawn to serve as jurors are dead, removed out of the county, or otherwise disqualified to serve as jurors, the scrolls with the names of such persons must be destroyed, and in such cases other persons shall be drawn in their stead.

§ 9-8. *How drawing to continue.*—The drawing out of partition marked No. 1 and putting the scrolls drawn into partition No. 2 shall continue until all the scrolls in partition No. 1 are drawn out, when all the scrolls shall be returned into partition No. 1 and drawn out again as herein directed.

§ 9-19. *Exemptions from jury duty.*—All practicing physicians, licensed druggists, telegraph operators who are in the regular employ of any telegraph company or railroad company, train dispatchers who have the actual handling of either freight or passenger trains, regularly licensed pilots, regular ministers of the gospel, officers or employees of a state hospital for the insane, active members of a fire company, funeral directors and embalmers, printers and linotype operators, all millers of grist mills, all United States railway postal clerks and rural free delivery mail carriers, locomotive engineers, brakemen and railroad conductors in active service, radio broadcast technicians, announcers, and optometrists, registered or practical nurses in active practice and practicing attorneys at law, and all members of the national guard, North Carolina state guard and members of the civil air patrol, naval militia, officers reserve corps, enlisted reserve corps, and the naval reserves, who comply with and perform all duties required of them as members of the national guard, naval militia, officers reserve corps, enlisted reserve corps, and the naval reserves, shall be exempt from service as jurors.

§ 9-24. *How grand jury drawn.*—The judges of the superior court, at the terms of their courts, except those terms which are for the trial of civil cases exclusively, and special terms for which no grand jury has been ordered,

shall direct the names of all persons returned as jurors to be written on scrolls of paper and put into a box or hat and drawn out by a child under ten years of age; whereof the first eighteen drawn shall be a grand jury for the court; and the residue shall serve as petit jurors for the court.

§ 9-29. *Special venire to sheriff in capital cases.*—When a judge of the superior court deems it necessary to a fair and impartial trial of any person charged with a capital offense, he may issue to the sheriff of the county in which the trial may be a special writ of venire facias, commanding him to summon such number of persons qualified to act as jurors in said county as the judge may deem sufficient (such number being designated in the writ), to appear on some specified day of the term as jurors of said court; and the sheriff shall forthwith execute the writ and return it to the clerk of the court on the day when it is returnable, with the names of the jurors summoned.

§ 9-30. *Drawn from jury box in court by judge's order.*—When a judge deems a special venire necessary, he may, at his discretion, issue an order to the clerk of the board of commissioners for the county, commanding him to bring into open court forthwith the jury boxes of the county, and he shall cause the number of scrolls as designated by him to be drawn from box number one by a child under ten years of age. The names so drawn shall constitute the special venire, and the clerk of the superior court shall insert their names in the writ of venire, and deliver the same to the sheriff of the county, and the persons named in the writ and no others shall be summoned by the sheriff. If the special venire is exhausted before the jury is chosen, the judge shall order another special venire until the jury has been chosen. The scrolls containing the names of the persons drawn as jurors from box number one shall, after the jury is chosen, be placed in box number two, and if box number one is exhausted before the jury is chosen, the drawing shall be completed from box number two after the same has been well shaken.